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No. 80-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ELECTRIC COMPANY, *Petitioner,*

v.

CURTISS-WRIGHT CORPORATION, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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1. Contrary to the assertions in Respondent's Brief in Opposition ("Opp."), this case clearly does present an issue of general importance: the enforceability of release clauses running in favor of the Government as well as prime Government contractors. This issue immediately affects outstanding contracts in the amount of *at least* $975,000,000.[1] Moreover, if facile devices like those by

[1] This amount *excludes* contracts placed by Westinghouse for the Navy; it is therefore a conservative estimate. Respondent is simply in error in suggesting that "it is unclear whether this figure excludes those contracts placed by Westinghouse . . ." (Opp., p. 11, n. 21). In any event, the disregard of public policy and plain language reflected below could be repeated by judicial creation of special exceptions without legal foundation, no matter what law is ostensibly applicable.

which the courts below declined to enforce the clause were to be countenanced, there *never* could be assurance that such clauses would be honored. This effect is brought home clearly by Curtiss-Wright's suggestion that General Electric is to be faulted for not revising the clause in light of the District Court's decision (Opp., p.12). As it is difficult to see how the clause could be any clearer, Curtiss-Wright's suggested "cure" is but illusory.

2. Clauses of the nature involved here surely do serve an important public policy, which a failure to enforce directly contravenes: insuring that claims and disputes will be raised and resolved when the facts regarding them are fresh, and establishing definite times of conclusion so the contracting parties and the Government can know that there remain no open questions hanging over the future accomplishment of Government work. Refusal or neglect to raise problems as they arise makes Government programs, in this case the Naval Nuclear Program vital to our national security, less effective and more costly. It forestalls resolutions and settlements precluding future diversion of resources and enabling the solutions to be promptly applied for the benefit of the Program. Delaying the discussion and solution of a resolvable problem manifestly increases waste and inefficiency. It makes difficult and inefficient the investigation of, and possible agreement upon, the factual record relating to the problem. To secrete claims in an effort to avoid the elimination or mitigation of damages is to increase the expense of this Program to the taxpayers. Enforcement of a contract provision aimed at requiring the prompt submission of claims thus serves the public interest.

As the Navy made clear with respect to the precedential implications, which Respondent derogates, a "troublesome aspect" of the payment without release mandated below "is the dangerous precedent it would set for other subcontractors. By making a claims release a negotiable issue with vendors when final payment is otherwise due, the article's intent would be negated. There would be no incentive for subcontractors to resolve claims in a timely manner" (Petition, Appendix, p. 25a).

3. Respondent cannot deny what the District Court Opinion shows on its face, that there was no consideration of the policy questions or the portents for the administration of Government contracts and the payment of Government funds (Petition, Appendix, pp. 2a-9a). When an interpretation of state law is untenable, *Bishop* v. *Wood*, 426 U.S. 341, 347 (1976), or is "clearly erroneous or unreasonable", *United States* v. *Durham Lumber Company*, 363 U.S. 522, 527 (1960), this Court will act. Respondent proffers no tenable, valid or reasonable explanation of how a "condition precedent" to final payment can be distorted into something that is not a condition precedent.[2] On the merits, its legal arguments and those of the District Court are unfounded and unsustainable under *any* law.

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[2] Not one of the cases cited by Respondent involves, much less overrides, a condition precedent to final payment (Opp., pp. 12-17). Respondent's continued reliance on strained analogies to cases which are plainly inapposite, in the face of clear precedent enforcing conditions precedent in indistinguishable circumstances (*see* Petition, pp. 12-13, n. 8), only underscores the lack of support for the judgment below.

For the reasons stated above and in the Petition, the Petition should be granted.

Respectfully submitted,

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